BCM Development Sdn Bhd v The Titular Roman Catholic Bishop of Malacca Johore

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–1189 OF 2009
KN SEGARA, SULONG MATJERAIE AND SULAIMAN DAUD JJCA
11 MARCH 2010

Contract — Breach — Termination — Breach of development right agreement ('DRA') — Whether DRA displaced by subsequent agreement or event/s not foreseeable by parties — Whether termination right and valid

The appellant/plaintiff was a construction and development company. The respondent/defendant was a non-profitable religious body and the registered and beneficial owner of certain pieces of land ('the land'). The defendant entered into a joint venture agreement (called the development right agreement ('DRA')) with the plaintiff wherein the defendant granted the plaintiff the exclusive right to develop the said land. Under the DRA, the plaintiff was to, inter alia, pay the defendant a total sum of RM24m ie RM4m upon execution of the agreement, the remainder by way of several instalments. Under the terms of the DRA, the plaintiff was obliged, inter alia: (i) to submit and obtain from the appropriate authorities, at its own expense, such plans as were necessary for the development of the said land; (ii) to comply with all relevant statutory rules and conditions imposed in relation to the development; (iii) to construct at its own expense in accordance with the standard requirements of the appropriate or other public authorities, all roads, etc; and (iv) to bear all costs of the development of the said project. Subsequently the plaintiff informed the defendant that the permanent access to the project which was to be along a road reserve was being occupied by squatters and required that the defendant take necessary steps to vacate the squatters. The defendant replied that it was the plaintiff's responsibility to address the problem of squatters. The plaintiff then claimed that due to the issue of the squatters, the local authority had decided not to approve further plans, and as such purported to suspend the mutual obligations under the DRA until the squatter issue was resolved. The plaintiff then defaulted in paying the third tranche of the instalment and interest charges. The defendant sent the plaintiff a notice stating that the DRA would be deemed to be terminated if the plaintiff failed to remedy the default within 30 days. The plaintiff contended that the payment was not due since the DRA had been suspended. The plaintiff, inter alia, claimed that it was an implied term of the DRA that the defendant was to be responsible to remove the squatters and that accordingly the plaintiff was entitled to suspend the DRA. The issues that arose for determination were: (i) whether the plaintiff was entitled

to suspend the DRA; and (ii) whether the plaintiff's failure to make the payments due to the defendant amounted to a fundamental breach of contract. The learned trial judge held that the suspension of the DRA was unlawful. According to His Lordship, even though the plaintiff knew that there were squatters on the road reserve, the plaintiff agreed to undertake to develop the defendant's land at the plaintiff's own costs and according to the layout plans and to comply in all respects with the conditions imposed in the approval granted in respect of the project. The squatter issue had existed even prior to the execution of the DRA. It was not an intervening event. Therefore, it was not necessary to imply into the DRA that the defendant was to be responsible for removing the squatters. The plaintiff was not entitled to suspend the DRA. The learned trial judge also held that the plaintiff's failure to make the payments due under the DRA was a fundamental breach of contract by reason of s 56 of the Contracts Act 1950.

Held, allowing the appeal in part:

(1) The DRA contained an 'entire agreement' clause (cl 20) which expressly provided that the DRA embodied the entire understanding of the parties. The DRA had not been displaced by any subsequent agreement or event/s not foreseeable by the parties. The trial judge was correct in his finding on the facts and the law in respect of the two issues confronting him regarding the determination of the liability of the parties (see paras 30–31).

(2) The order of the trial judge dismissing the plaintiff's claim was confirmed. The defendant had rightly and validly terminated the DRA (see para 32).

[Bahasa Malaysia summary

Perayu/plaintif merupakan sebuah syarikat pembinaan dan pembangungan. Responden/defendan merupakan sebuah pertubuhan keagamaan tidak berasaskan keuntungan dan pemilik berdaftar dan benefisial beberapa bidang tanah ('tanah'). Plaintif dan defendan menandatangani suatu perjanjian usaha sama (dikenali sebagai perjanjian hak pembangunan ('PHP')) di mana defendan memberi hak eksklusif kepada plaintif untuk membangunkan tanah tersebut. Di bawah PHP, plaintif perlu, antara lain, membayar defendan sebanyak RM24 juta iaitu RM4 juta setelah menandatangani perjanjian dan selebihnya secara ansuran. Di bawah terma PHP, plaintif berkewajipan, antara lain: (i) menyerahkan dan mendapatkan sendiri pelan-pelan yang diperlukan bagi pembangunan tanah tersebut daripada pihak berkuasa tempatan; (ii) untuk mematuhi semua peraturan statut dan syarat-syarat yang dikenakan berhubungan pembangungan tersebut; (iii) untuk membina, selari dengan kehendak standard yang diperlukan atau pihak berkuasa lain, kesemua jalan raya, dan lain-lain, dan (iv) untuk menanggung semua kos pembangunan projek tersebut. Kemudian, plaintif

telah memaklumkan kepada defendan bahawa akses tetap bagi projek tersebut iaitu di sepanjang sebuah jalan rizab, dididuki oleh penghuni setinggan dan memerlukan defendan mengambil langkah sewajarnya bagi menyingkirkan mereka. Defendan membalas bahawa adalah menjadi tanggungjawab plaintif untuk mengatasi masalah penduduk setinggan. Plaintif mendakwa akibat isu setinggan, pihak berkuasa tempatan berkeputusan untuk tidak membenarkan perancangan selanjutnya dan bertujuan untuk menggantung obligasi bersama di bawah PHP sehingga isu setinggan diselesaikan. Plaintif kemudiannya gagal membayar peringkat ketiga bagi caj ansuran dan faedah. Defendan memberi notis kepada plaintif menyatakan PHP dianggap tamat jika plaintif gagal meremedikan keingkaran dalam masa 30 hari. Plaintif menghujahkan bayaran tidak dibuat kerana PHP telah digantung. Plaintif, antara lain, mendakwa bahawa terma tersirat PHP menyatakan defendan bertanggungjawab untuk menyingkirkan penduduk setinggan dan selanjutnya plaintif berhak menggantung PHP. Isu-isu yang berbangkit untuk penentuan adalah: (i) sama ada plaintif berhak menamatkan/menggantung PHP; dan (ii) sama ada kegagalan plaintif untuk membuat bayaran yang perlu dibayar kepada defendan menjadikan suatu keingkaran kontrak yang asas. Hakim bicara memutuskan bahawa penamatan/penggantungan PHP adalah menyalahi undang-undang. Menurut hakim bicara, walaupun plaintif tahu terdapatnya penduduk setinggan di sepanjang jalan rizab, plaintif bersetuju untuk mengakujanji bagi membangunkan tanah defendan dengan kos plaintif sendiri berdasarkan pelan susun atur dan mematuhi syarat-syarat yang dikenakan bagi mendapatkan kebenaran bagi projek tersebut. Isu penduduk setinggan telah berbangkit sebelum PHP ditandatangani. Ia bukan satu keadaan yang menghalang. Oleh itu, adalah tidak perlu untuk mentafsirkan daripada PHP tersebut bahawa defendan adalah bertanggungjawab bagi menyingkirkan penduduk setinggan tersebut. Plaintif tidak berhak menggantung PHP. Hakim bicara juga memutuskan bahawa kegagalan plaintif untuk membuat bayaran yang perlu dibayar di bawah PHP adalah suatu keingkaran kontrak yang asas di bawah s 56 Akta Kontrak 1950.

Diputuskan, membenarkan sebahagian rayuan:

(1) PHP mengandungi klausa 'keseluruhan perjanjian' (klausa 20) yang memperuntukkan bahawa PHP mewujudkan persefahaman pihak-pihak. PHP tidak digantikan oleh sebarang perjanjian selepas itu atau kejadian yang tidak dapat diramal oleh pihak-pihak. Hakim bicara adalah betul dalam keputusannya bahawa fakta dan undang-undang bagi dua isu berkenaan menentukan liabiliti pihak-pihak (lihat perenggan 30–31).

(2) Perintah hakim bicara yang menolak dakwaan plaintif disahkan. Defendan telah menamatkan PHP dengan betul dan sah (lihat perenggan 32).]

Notes

For cases on termination, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2779–2783.

Cases referred to

Bell v Lever Brothers, Limited [1932] AC 161, HL (refd)

Lombard North Central Plc v Butterworth [1987] QB 527 (refd)

R v Paddington and St Marylebone Rent Tribunal, ex parte Bedrock Investments Ltd [1947] KB 984 (refd)

Tai Hing Cotton Ltd v Liu Chong Bank [1985] 2 All ER 947, PC (refd)

Legislation referred to

Contracts Act 1950 s 56

Appeal from: Civil Suit No MT4–22–100 of 2002 (High Court, Johor Bahru)

Chen Wai Jiun (WJ Chen & Co) for the plaintiff.
Raja Aziz Addruse (Nicole Wee with him) (Chooi & Co) for the respondent.

KN Segara JCA:

[1] The appellant (plaintiff) is a licensed construction and development company and has described itself as being a company which had sufficient 'experience and technical knowledge in the construction development and is in a sound financial position to undertake the development of any privatised property project'.

[2] The respondent (defendant) is a body incorporated under the Roman Catholic Bishops (Incorporation) Act 1957 as a non-profitable religious body. The defendant is the registered and beneficial owner of all that pieces of land held under Grant 1968 Lot 287, Grant 1969 Lot 288, Grant 517 Lot 755, Grant 565 Lot 806, CT 14835 Lot 2560, CT 14386 Lot 2561 and CT 14537 Lot 2562, all situate in the Mukim of Plentong, in the District of Johore Bahru, Johor, measuring an area approximately 241.249 acres (collectively called 'the said land'). Part of CT 14835 Lot 2560 was acquired by the government by way of compulsory acquisition such that the total area of the said land after the said compulsory acquisition measures approximately 231.4244 acres.

[3] On 16 March 1997 the defendant entered into a joint venture agreement (development right agreement ('DRA')) with the plaintiff to develop the said land.

[4] The DRA provided, inter alia, that the defendant would grant the plaintiff the exclusive right and authority to develop the said land in consideration of:

(a) the payment by the plaintiff to the defendant a total sum of RM24m, referred to as cash consideration, to be made in the following manner (see cl 1.1, cl 3.1.2 and cl 4.2.1):

(i) RM4m, on the execution of the agreement;

(ii) the balance of RM20m, by installments and on the following dates:
RM3m on 31 December 1998;
RM5m on 31 December 1999;
RM6m on 31 December 2000; and
RM6m on 31 December 2001.

[5] With respect to the installment payments above, the defendant would extend the time of payment if requested by the plaintiff, subject however to the payment of interest by the plaintiff.

(b) the provision by the plaintiff to the defendant of the agreed number of units of each of the different categories of the premises to be designed, constructed and completed by the plaintiff pursuant to the DRA, as listed in Appendix C to the DRA (see cl 4.3.1)

[6] Under the terms of the DRA, the plaintiff was obliged:

(a) to submit and obtain from the appropriate authorities, at its own expense, such plans as were necessary for the development of the said land by phases and for subdivision (cl 8.1.1);

(b) *to comply in all respects* with all relevant statutory instruments, rules, orders, regulations and bylaws of the appropriate authorities, and, in particular, *with the conditions imposed in the approvals granted in relation to the development of such phases of the said project and shall do all such development works and things as shall be lawfully required thereby* and pay and (without prejudice to any statutory indemnity) indemnify the owner against all fees, etc, and expenses to be made or incurred thereunder (cl 8.1.5);

(c) at its own cost and expense *to construct in accordance with the standard requirements* of the appropriate or other public authorities *all roads*, etc *to and within the said land* and on the completion thereof to do all acts within its power to have the same taken over and maintained by the appropriate public authorities (cl 8.1.8);

A (d) *to bear all costs of the development of the said project*, including ... (cl 8.1.13);

[7] The plaintiff did not pay the first tranche (RM3m) of the balance of RM20m when it became due and payable on 31 December 1998.

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[8] The parties entered into a supplementary agreement to, inter alia, defer the time of payment of the first and second tranches of the balance of the RM20m by smaller installments, as provided in Appendix A to the agreement (see the supplementary agreement, new cl 4.2.1). Appendix A also provided C for the interest charges which the plaintiff had to pay for deferring those installments.

[9] The parties entered into a second supplementary agreement by which D the defendant agreed, inter alia, to further vary the amounts of the aforesaid installments and the times at which the plaintiff had to pay them (see the second supplementary agreement cl 1.2(a) and Appendix A1).

[10] On 21 December 1999 the *plaintiff* wrote to the defendant to say that E the permanent access to the project which was to be along a road reserve was being occupied by squatters and *required that the defendant take all necessary and expedient steps to vacate the squatters and to demolish the squatter buildings*. On 23 December 1999 the defendant replied to point out that it was the plaintiff's responsibility to address the problem of squatters and not that of F the defendant. The plaintiff maintained that it was the defendant's responsibility to remove the squatters and until that was done, the development of the said land could not be 'perfected' and that the defendant was, therefore, to take immediate and effective steps to cause the squatters to be removed and the squatter buildings demolished. On 31 December 1999 G the defendant reiterated its position that under the DRA it was not its obligation to deal with the issue of the squatters.

[11] On 30 April 2001 the plaintiff informed the defendant that due to the issue of the squatters, the local authority had decided not to approve further H plans, including those for phase 2 of the project, and suggested that as the said decision was due to circumstances beyond the plaintiff's and defendant's control, it would be 'fair and equitable to suspend our mutual obligations under the DRA until such time as the squatter issues are resolved and the local authority approved the plans'.

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[12] On 30 May 2001 the defendant sought clarification from the plaintiff as to its purported suspension of the DRA, seeking a reply within 24 hours.

[13] On 16 June 2001, as the plaintiff was overdue on the payment of interest charges amounting to RM62,500 which was payable on 31 May 2001, the defendant issued a notice of default requiring it to remedy it within 30 days.

[14] On 20 June 2001 the plaintiff repeated what it had said in the letter of 30 April 2001 and reiterated its position that as the issue of the squatters was beyond the control of both parties it would be fair and equitable to suspend the respective obligations of the parties under the DRA. It added that the *payment of cash consideration* shall be one of the obligations that *would be suspended*. It took the position:

> that since the DRA has been suspended, the non-payment of the interest charges of RM62,500 purportedly becoming due on 31/5/2001 cannot amount to a default as alleged by you in your letter of 16.6.2001. However, if you insist otherwise, we would have no alternative but to refer the issue to a competent Court of Law for adjudication.

[15] On 24 September 2001 the defendant, through solicitors, issued a notice of default, citing, inter alia, the plaintiff's failure to pay:

(a) the third tranche of the balance of the RM20m which had become due on 31 December 2000;

(b) the interest thereon, due and payable on 31 May 2001.

[16] On 4 October 2001 the plaintiff denied liability for any of the payments stated in the notice of default, contending that the DRA had been suspended until such time when all matters relating to the squatter issue has been resolved to the satisfaction of the relevant authority.

[17] On 12 December 2001 the defendant, through solicitors, sent another notice of default regarding the plaintiff's failure to pay the third tranche of the cash consideration and interest charges, stating that the DRA would be deemed to have been terminated if the plaintiff failed to remedy the default within 30 days.

[18] On 16 January 2002 when the plaintiff still failed to remedy the defaults stated in the notices of default dated 24 September 2001 and 12 December 2001, the defendant, through solicitors, terminated the DRA.

[19] The plaintiff informed the defendant that it considered the defendant's termination of the DRA wrongful and as amounting to a repudiation of the DRA, which it accepted, and that it would institute proceedings against the defendant.

[20] On 31 January 2002 the defendant refuted the plaintiff's allegation of wrongful termination and repudiation of the DRA, and, requested the plaintiff to deliver up to the defendant:

(a) vacant possession of the said land;

(b) the sales and purchase agreements which the plaintiff, as the defendant's attorney, had entered into with the various purchasers of the units in the project, together with all plans, layout plans, accounts, receipts, etc;

(c) the block titles and subdivided titles to the said land.

[21] The plaintiff refused to deliver up possession of the block and subdivided titles, contending that it had a lien over them because of its contingent liability to the various public authorities to pay land premium, contributions and deposits by virtue of its being the developer of the project.

[22] On 14 February 2002 the plaintiff instituted an action against the defendant in the High Court for damages on the ground that the plaintiff's failure to pay the third tranche of RM6m and RM62,500 did not constitute a fundamental breach of the DRA which warranted termination. Alternatively, the plaintiff contended that the said RM6m and RM62,500 were not due for payment because the DRA had been suspended by reason of the following:

(a) that it was an implied term of the DRA that defendant was to be responsible to remove the squatters;

(b) that until the squatters were removed the local authority would not approve further plans for the project, resulting in the completion of the project being held up;

(c) that in the circumstances, the plaintiff was entitled to suspend the DRA, including its obligations to pay the cash consideration payable under the DRA and the agreed interest charges;

(d) that there had, therefore, been no default committed by the plaintiff as alleged by the defendant.

[23] The defendant counterclaimed for damages for breach of contract and for the return of the documents of title, which the plaintiff refused to deliver up after the termination of the DRA.

[24] At the High Court it was agreed by the parties that the issue on liability should be dealt with and determined first and, thereafter, the issue of damages (and any other consequential claims).

[25] The trial judge accordingly dealt with the plaintiff's case by considering the two main issues pivotal to determining the issue on liability only, namely:

(1) whether the plaintiff was entitled to suspend the DRA; and

(2) whether the plaintiff's failure to make the payments due to the defendant amounted to a fundamental breach of contract.

[26] The plaintiff had submitted (i) that the local authority's decision to withhold approval of the building plans pending the removal of the squatters was an intervening event beyond the control of the parties which made it fair and equitable that the DRA be suspended for the time being and (ii) that it was an implied term of the DRA that the defendant was to be responsible for removing the squatters.

The first issue: whether the suspension of the DRA valid

[27] The learned trial judge came to a finding that the suspension of the DRA was unlawful. He declined to imply into the DRA the term suggested by the plaintiff, namely, 'the plaintiff was to be responsible for removing the squatters' based on the established principles that the test for implication of a term, *is necessity*, as enunciated in:

(a) *R v Paddington and St Marylebone Rent Tribunal, ex parte Bedrock Investments Ltd* [1947] KB 984 at p 990 (per Lord Goddard CJ):

> No covenant ought ever to be implied unless there is such a necessary implication that the court can have no doubt what covenant or undertaking they ought to have written into the agreement.

(b) *Tai Hing Cotton Ltd v Liu Chong Bank* [1985] 2 All ER 947 (PC) at p 955 (per Lord Scarman):

> Their Lordships agree with Cons J the test of implication is necessity. As Lord Wilberforce put it in *Liverpool City Council v Irvin and another appellants* [1976] 2 All ER 39 at p 44; [1977] AC 239 at p 254:
>
> > … such obligation should be read into the contract as the nature of the contract implicitly requires, no more, no less; a test in other words of necessity.
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> Cons JA went on to quote an observation by Lord Salmon in the *Liverpool* case [1976] 2 All ER 39 at p 51; [1977] AC 239 at p 263 to the effect that the term sought to be implied must be one without which the whole transaction would become 'futile, inefficacious and absurd'.

A and

(c) *Bell v Lever Brothers, Limited* [1932] AC 161 at p 226 (per Lord Atkin):

> Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which they have not in terms made by importing implications which would appear to make the contract more businesslike or more just. The implications to be made are to be no more than are 'necessary' for giving business efficacy to the transaction and it appears to me that, both as to the existing facts and future facts, a condition would not be implied unless the new state of facts makes the contract something different in kind from the original state of facts.

[27] The learned trial judge after having carefully considered all the evidence before him, stated in his grounds of judgment:

> …, the question that arises is, therefore, whether the requirement by the local authority, as a condition of its approving the layout plan to the project, that the squatters be removed from the land reserve, had created a new state of facts which made the DRA something different in kind from the contract in the original state of facts.
>
> Now, some important facts that cannot be overlooked in considering this question are as follows. In the fist instance the DRA does not have any provisions to allow any parties to suspend it or the terms of any of its operations. It is to be noted that the preparation and submission of the layout plan for the project was done by the plaintiff. The layout plan submitted by the plaintiff had earmarked the land reserve as the permanent access to the project. It is equally important to stress that according to PW1, the plaintiff knew that there were squatters on the land reserve. And yet the plaintiff had decided that the joint venture with the defendant was feasible and profitable and subsequently entered into the DRA on the agreed terms. The plaintiff's role under the DRA was that of a developer. It is also important to emphasise that even though the plaintiff knew that there were squatters on the road reserve, the plaintiff agreed to undertake to develop the defendant's land at the plaintiff's own costs and according to the layout plans and to comply in all respects with the conditions imposed in the approval granted in respect of the project. I do not think the requirement by the local authority, as a condition of its approving the layout plan to the project, that the squatters be removed from the land reserve had created a new state of facts. Indeed the squatter issue had existed even prior to the execution of the DRA. It was not an intervening event as argued by counsel for the plaintiff.
>
> Therefore, based on the evidence presented before me and taken them as a whole then, I am unable to accept that it is necessary, in the circumstances of the present case, to imply into the DRA that the defendant was to be responsible for removing the squatters occupying the land reserve approved by the authority for the construction of the permanent access road to the project.
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> … I am unable to agree … that the plaintiff was entitled to suspend the DRA ... the plaintiff's suspension of the DRA was unlawful.

The second issue: whether fundamental breach of contract

[28] The learned trial judge found as a fact that the plaintiff had failed to pay the tranches of the balance of the RM20m cash consideration and interest thereon on the due dates, and held such breach to be a fundamental breach of contract by reason of s 56 of the Contracts Act 1950 and on the principle explained in *Lombard North Central Plc v Butterworth* [1987] QB 527 at p 536. In his grounds of judgment the trial judge stated:

> It cannot be disputed that as at 24 September 2001, the plaintiff had failed to pay the interest charge of RM62,500 due on 31 May 2001. The third tranche of RM6m and the interest charge of RM62,500 had been outstanding for some four months. As at 21 December 2001, the date of the notice, the said payment remained outstanding. And when the defendant had by notice dated 16 January 2002 terminated the DRA those amounts had been outstanding for more than six months.
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> The plaintiff took the position by letter dated 13 December 2001 that it was not in default of the DRA for the reason that the DRA had been suspended. The plaintiff further contended that, in any event, the breaches were not breaches of the fundamental terms of the DRA.
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> …
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> As I have held earlier the plaintiff's suspension of the DRA was unlawful.
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> … I will deal with the argument advanced by learned counsel for the plaintiff that the breaches to have been committed by the plaintiff in the notice of 12 December 2001 were not fundamental breaches of the DRA.
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> … It is an established principle of law that failure to do an act required under contract to be done by a specified breach, constitutes a fundamental breach, if time is stipulated to be the essence of the contract. In this regard ... the case of *Lombard Plc v Butterworth* [1987] 1 QB 527 where the issue was whether a provision of a contract, which stipulated that time for payment by installments was to be of the essence, had the effect of making the defendant's late payment of the outstanding installments a repudiatory breach. In addressing this issue, Mustill LJ said at p 535:
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> > The reason why I am impelled to hold that the plaintiffs' contentions are well — founded can most conveniently be set out in a series of propositions.
> >
> > (1) Where a breach goes to the root of the contract, the injured party may elect to put an end to the contract. Thereupon both sides are relieved from those obligations which remain unperformed.
> >
> > (2) If he does so elect, the injured party is entitled to compensation for (a) any breaches which occurred before the contract was terminated, and (b) the loss of his opportunity to receive performance of the promisor's outstanding obligations.
> >
> > (3) Certain categories of obligations, often called conditions, have the property that any breach of condition, the injured party can elect to terminate and claim damages, whatever the gravity of the breach.

(4) It is possible by express provision in the contract to make a term a condition, even if it would not be so in the absence of such a provision.

(5) A stipulation that time is of the essence, in relation to a particular contractual term, denotes that timely performance is a condition of the contract. The consequence is that delay in performance is treated as going to the root of the contract, without regard to the magnitude of the breach.

(6) It follows that where a promisor fails to give timely performance of an obligation in respect of which time is stated to be of the essence, the injured party may elect to terminate and recover damages in respect of the promisor's outstanding obligations, without regard to the magnitude of the breach.

Furthermore s 56 of the Contracts Act 1950 states:

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

In the case at hand, it cannot be disputed that the time of the essence stipulation provided by cl 23 of the DRA was to apply also to the payment of the tranches of the balance of the RM20m cash consideration and of the interest charges on the dates specified in cl 4.2.1, read with Appendix A, of the supplementary agreement. That is why, going by the principle of law, which I have stated earlier, I agree with the submission of learned counsel for the defendant that in the present case, the time of the essence stipulation was to apply also to the payment of the balance of the RM20m cash consideration and of the interest charges on the dates specified.

… it is my judgment that the plaintiff's failure to pay the amounts outstanding on the dates they became due constituted breaches of a fundamental term, going to the root of the contract which entitled the defendant to terminate the DRA.

[29] We have perused the record of appeal carefully and have taken into consideration the all the documentary and oral evidence placed before the trial judge. We are unanimous that the DRA contained an 'entire agreement' clause (cl 20) which expressly provided that the DRA embodies the entire understanding of the parties. The DRA has not been displaced by any subsequent agreement or event/s not foreseeable by the parties. Clause 20 of the DRA is unequivocal in its expression. It reads:

The parties hereto hereby jointly and severally declare, agree and confirm that this agreement embodies the entire understanding of the parties hereto and there are no provisions, terms, conditions or obligations, oral or written, express or implied other than those contained herein and in the event of this agreement being found inconsistent with any other document or documents signed by them prior to the execution of this agreement the terms of this agreement shall prevail.

[30] We are unanimous that the trial judge was correct in his finding on the facts and the law in respect of the two pivotal issues confronting him regarding the determination of the liability of the parties, discussed above.

[31] Accordingly, we confirm the order of the trial judge made on 10 June 2009 dismissing the plaintiff's claim and, we also confirm that part of the order which declares 'that the defendant had rightly and validly terminated the DRA (development right agreement)'. However, all the other orders made by the trial judge are set aside because the issue of liability only was agreed to be determined first. The case is, therefore, remitted to the High Court, Johore Bahru for the determination of all the other prayers in the counterclaim in accordance with the development right agreement. Parties are to appear before the Registrar of the High Court Johore Bahru on 19 March 2010 for case management, and, obtain an early hearing date.

[32] Each party is to bear its own costs. Deposit refunded to the appellant.

Appeal allowed in part.

Reported by Kanesh Sundrum